

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Javier Espinoza,

NO 46486-1

Petitioner.

PERSONAL RESTRAINT PETITION

A. STATUS OF PETITIONER

I, Javier Espinoza, apply for relief from confinement. I am now in custody serving a sentence upon a conviction of a violation of the Uniform Controlled Substance Act.

1. The court in which I was sentenced is Pierce County Superior Court.

2. I was convicted of one count of unlawful possession of a controlled substance with intent to deliver, to wit; Methamphetamine, and one count of unlawful possession of a controlled substance with intent to deliver, to wit: Heroin.

3. I was sentenced after a jury verdict on October 18, 2013. The judge who imposed sentence was RUMBAUGH, S.

4. My lawyer at trial was Lisa Mulligan.

5. I did appeal from the decision of the trial court. I appealed to Court of Appeals, Division II.

a. I represented myself.

b. The decision of the appellate court was not published.

6. Since my conviction I have not asked a court for some relief from my sentence other than I have already written above.

7. The Court of Appeals, Division II, remanded my case back to the trial court to reconstruct the record of missing

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testimony from the hearing on defendant's motion to suppress.

B. GROUNDS FOR RELIEF

I claim I have the following grounds for this court to grant me relief from my sentence.

1. The trial court miscalculated my offender score.
 - a. The trial court erred in counting the two current offenses separately.
 - b. The trial court erred in counting the out-of-state conviction without first following the required comparable test.
 - c. The out-of-state conviction washed out.
2. The trial court abused its discretion in imposing an exceptional sentence.
3. There was insufficient of evidence to impose the school zone enhancement.

I should be resentenced with the correct offender score, within the correct standard sentencing range, and without the exceptional sentence, and/or the school zone enhancement.

2. The following facts are important when considering my case.

At sentencing, the respondent did not presented the necessary evidence in support of the exceptional sentence, and the sentencing court did not made the comparable examination of the out-of-state offense to make a determination whether the offense is a class C felony in the State of Washington, and washed out.

3. The following reported court decisions show the error

I believe happened in my case:

State v. Walters, 162 Wn.App 74 (2011);

State v. Larkins, 147 Wn.App 858 (2008);

State v. Weiland, 66 Wn.App 29 (1992);

State v. Cameron, 80 Wn.App 374 (1996);

In re Pers. Restraint of Crawford, 150 Wn.App 787 (2009)
(failure of petitioner's counsel to challenge petitioner's non-comparable Kentucky offense was prejudicial ineffective assistance of counsel)

State v. Malone, 138 Wn.App 587 (2007)(defendant stipulated to three prior convictions; at the sentencing hearing he was not required to stipulate to the offender score calculated by the State; the score was wrong because defendant's two prior Texas convictions washed out under RCW 9.94A.525(2));

State v. Winings 126 Wn.App 75 (2005);

State v. Huff, 119 Wn.App 367 (2003)(Trial court properly relied on the parties's stipulation of defendant's Illinois felony conviction for defendant's offender score and sentence under RCW 9.94A.525 where defendant requested the stipulation in lieu of additional proof, rebuffed the opportunity for additional documentation, was represented by counsel, and signed the "detailed" stipulation himself);

State v. Russell, 104 Wn.App 422 (2001);

State v. Berry, 141 Wn.2d 121 (2000);

State v. Ford, 137 Wn.2d 472 (1999)(Where prior out-of-state convictions are used to increase an offender score, it is the State, not the defendant, who bears the burden of ensuring the record supports the existence and classification of the out-of-state conviction);

State v. McCorkle, 137 Wn.2d 490 (1999);

State v. Morley, 134 Wn.2d 588 (1998);

State v. Wiley, 124 Wn.2d 679 (1994)(A crime's elements, not its maximum punishment, determine whether a crime is comparable);

State v. Roche, 75 Wn.App 500 (1994)(Because record was devoid of the underlying facts upon which California robbery conviction was based, it was impossible to determine how it would have been classified in Washington; therefore, the conviction should be removed from the calculation of criminal history unless, on remand, the state was able to establish that it constituted a class A felony under Washington law);

In re Goodwin, 146 Wn.2d 861 (2002)(In general a defendant cannot waive a challenge to a miscalculated offender score);

State v. Ervin, 169 Wn.2d 815 (2010)(Because defendant, for a period of five years, did not commit any crime subsequently resulting in a conviction, and because defendant was not confined pursuant to a felony conviction during that period, his prior class C felonies washed out pursuant to RCW 9.94A.525(2)(c) and should not have been included in his offender score)

State v. Collins, 144 Wn.App 547 (2008)(right to waive an argument that the offender score was miscalculated);
1012 State v. Aronhalt, 99 Wn.App 302, review denied, 141 Wn.2d (2000);
1010 State v. Wright, 76 Wn.App 811, review denied, 127 Wn.2d (1995);
State v. Smith, 65 Wn.App 887 (1992);
State v. Hall, 45 Wn.App 766 (1986);
State v. Tornngren, 147 Wn.App 556 (2008);
State v. Gaworski, 138 Wn.App 141 (2007)(Defendant's convictions for manufacturing methamphetamine and for possession of precursors with intent to manufacture methamphetamine did arise from the same criminal conduct under RCW 9.94A.525(5)(a) because possession with intent to manufacture required a future intent and manufacturing required no future intent as the crime was complete);
State v. Eaton, 143 Wn.App 155 (2008);
State v. Flores, 164 Wn.2d 1 (2008)(major violations of the Uniform Controlled Substance Act);
State v. Jackson, 111 Wn.App 660 (2002) affirmed, 150 Wn.2d 251 (2003)(There is a two-part test to determine whether a factor legally supports an exceptional sentence);
State v. Gore, 143 Wn.2d 288 (2001);
State v. Taitt, 93 Wn.App 783 (1999)(The trial court's imposition of sentences without making a finding of substantial and compelling reasons to justify a sentence greater than called for in the sentencing guidelines requires a reversal and remand for resentencing);
State v. Scott, 72 Wn.App 207 (1993), affirmed sub nom. State v. Ritchie, 126 Wn.2d 388 (1995)(the review of the legal adequacy of the aggravating factors used to justify a departure from the standard sentence range is a question of law);
State v. Ross, 71 Wn.App 556 (1993), review denied, 123 Wn.2d 1019, amended, 383 P.3d 329 (1994)(In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: rely on an impermissible reason or impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court);
State v. Solberg, 122 Wn.2d 688 (1993);
State v. Perez, 69 Wn.App 133, review denied, 122 Wn.2d 1015 (1993)(Factors making offense more egregious than typical justify exceptional sentence);
State v. Chadderton, 119 Wn.2d 390 (1992)(The correct offender score must be determined even if an exceptional sentence is imposed);
State v. McCollum, 88 Wn.App 977 (1997), review denied, 137 Wn.2d 1035 (1999)(Trial court's imposition of exceptional consecutive sentences was sustained where the evidence demonstra-

ted that the defendant was an active drug dealer);

State v. Reynolds, 80 Wn.App 851 (1996)(The fact that defendant committed a major violation of the controlled substances act is sufficient reason to impose an exceptional sentence);

State v. Alexander, 125 Wn.2d 717 (1995);

State v. Flores-Moreno, 72 Wn.App 733, review denied, 124 Wn.2d 1009 (1994);

State v. Valdovinos, 122 Wn.2d 270 (1993)(Nearly two pounds (846.1 grams) of cocaine found in defendant's home, when the standard amount for street level use of cocaine is one-half gram, was not a fairly typical instance of possession);

State v. Sanchez, 69 Wn.App 195, review denied, 121 Wn.2d 1031 (1993)(Exceptional sentence for delivery of one kilogram of cocaine was justified by fact that amount was greater than needed for personal use);

State v. Vasquez, 66 Wn.App 573 (1992)(496 grams of cocaine justified exceptional sentence for possession with intent to deliver);

State v. Morris, 87 Wn.App 654 (1997) review denied, 134 Wn.2d 1020 (1998);

State v. Calvert, 79 Wn.App 569 (1995), review denied, 129 Wn.2d 1005 (1996)

The following statutes and constitutional provisions should be considered by the court:

RCW 9.94A.500;

RCW 9.94A.525;

RCW 9.94A.533(6);

RCW 9.94A.535;

RCW 9.94A.537;

1st Amendment to the United States Constitution;

6th Amendment to the United States Constitution;

14th Amendment to the United States Constitution.

5. This petition is the best way I know to get the relief

I want, and no other way will work as well because if I were

to file a post-judgment motion with the trial court, the prosecu-

tor will immediately ask the trial court to transfer the motion

to this court to be determined as a personal restraint petition.

Therefore, it is a waste of time, and tax-payers money by an

attempt to follow the proper process with the trial court.

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C. STATEMENT OF FINANCES

I do ask the court to file my petition without making me to pay the filing fee because I am so poor I cannot pay the fee.

I have an spendable balance of \$10.00 in my prison account.

I do not ask the court to appoint a lawyer for me.

I am employed. My salary is \$25 to \$35. My employer is Coyote Ridge Correction Center, Kitchen Department.

During the past 12 months I did not get any money from business, profession or other form of self-employment.

During the past 12 months, I did not:

- get any rent payments.
- get any interest.
- get any dividends.
- get any other money.

I did not have any cash except as stated herein.

I do not own stocks, bonds, or notes.

I do not own any real estate property.

I am married.

I do have dependents.

All the bills I owe are:

Pierce County Superior Court, legal fees;
Others unknown.

D. REQUEST FOR RELIEF

I want the court to vacate my sentence, and remand for resentencing within the correct offender score, and without an exceptional sentence.

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E. OATH OF PETITIONER

STATE OF WASHINGTON)
) ss.
COUNTY OF FRANKLIN)

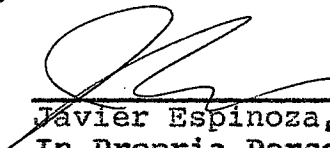
I, Javier Espinoza, after being first duly sworn, under oath, deposes and says:

1. That I am the petitioner, in the above-captioned matter.

2. That I have read the petition, know its contents, and I believe the petition is true.

IN ACCORDANCE WITH 28 USC § 1746, I declare that the foregoing is true and correct, under the penalty of perjury of the laws of the State of Washington.

DATED THIS 4th day of July, 2014.



Javier Espinoza, Petitioner
In Propria Persona

Case No. _____

Declaration of Service by Mail

IN ACCORDANCE WITH 28 USC § 1746, I declare that on this date, I mailed the following documents:

- A. Personal Restraint Petition;
- B. Declaration of Service by Mail; and
- C. Cover Letter

directed to:

David C. Ponzoha
Court Administrator/Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA. 98402

and served a copy to:

Mark Lindquist
Pierce County Prosecutor
930 Tacoma Ave. S. Rm. 946
Tacoma, WA. 98402

DATED THIS 4th day of July, 2014.



Javier Espinoza

Javier Espinoza # 369756
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA. 99326

2014 JUL -9 PM 1:28
STATE OF WASHINGTON
DY
DEPUTY

David C. Ponzoha
Court Administrator/Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA. 98402

July 4, 2014

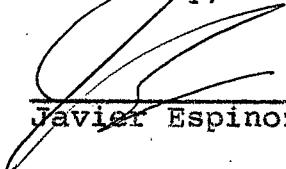
RE: Personal Restraint Petition

Dear Mr. Ponzoha:

Please find enclosed a Personal Restraint Petition, and Declaration of Service by Mail. I respectfully request to file them with the court.

Thank you for your time and consideration in this matter.

Sincerely,



Javier Espinoza

c: Javier Espinoza
Mark Lindquist